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Wemark v. State of Iowa, 2002 WL 1724022 (N.D. Iowa March 6, 2002) (Unpublished decision)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN-WATERLOO DIVISION

ROBERT E. WEMARK, Petitioner, vs. STATE OF IOWA, sub nominee JOHN MATHES, Warden, Newton Correctional Facility, Respondent.	No. C00-2023-MWB **MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS**

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I. INTRODUCTION AND BACKGROUND

Before the court is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, Robert E. Wemark, is an inmate at the Newton Correctional Facility, Newton, Iowa. On August 18, 1993, following a jury trial, petitioner Wemark was convicted of first-degree murder. The parties do not dispute the following underlying facts surrounding Wemark's conviction as described by the Iowa district court in its ruling on Wemark's application for postconviction relief:

> 1. On January 19, 1993, the applicant Robert E. Wemark killed his wife Melissa Wemark at his home in Ridgeway, Winneshiek County, Iowa. Melissa Wemark was stabbed 15 times. Four of the wounds to her back were fatal wounds. However, anywhere from 10 to 30 minutes would have elapsed between the wounds and her death. With proper, prompt medical attention she could have survived.
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> 2. Following the stabbing, Robert Wemark attempted to clean up the home. The murder weapon, a knife, was left in the home in a pile of junk located in the home's basement. Wemark then left the area with his two-year-old son. On January 20, 1993, Dickinson County Sheriff's Department followed a trail of bloody garments in the snow to the home of Merwyn Shorey located in rural Dickinson County. There they found Robert Wemark lying on the floor suffering from self-inflicted gunshot wounds.
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> Also on January 20, 1993, the body of Melissa Wemark was found in the Ridgeway residence.
>
> Wemark told medical personnel and law enforcement officers that on the previous morning he had fought with his wife and she had "fallen on a knife".

Wemark v. State, No. LACV022826, Doc. No. 19, Tab 3, at 1-2 (Iowa Dist. Ct. Mar. 14, 1998).

Petitioner Wemark filed a timely appeal of his conviction. The Iowa Court of Appeals affirmed his conviction in an unpublished decision on January 23, 1995. *See State v. Wemark*, No. 4-491/93-1276 (Iowa Ct. App. Jan. 23, 1995). Petitioner Wemark's

application to the Iowa Supreme Court for further review was denied on April 7, 1995. After his direct appeal was denied, petitioner Wemark filed an application for postconviction relief in Iowa district court on August 2, 1996, in which he asserted claims of ineffective assistance of counsel. The Iowa District Court denied petitioner Wemark's application for postconviction relief on March 14, 1998. Petitioner Wemark appealed that decision.

The Iowa Supreme Court made the following factual findings with respect to the circumstances surrounding Wemark's claim of ineffective assistance of counsel in causing the disclosure of the location of a knife used by Wemark to stab his wife:

> Wemark was represented at his trial by two experienced criminal defense lawyers. Prior to trial, the two lawyers filed a notice of intent to rely upon the defense of diminished responsibility. They were confronted with an abundance of evidence gathered by law enforcement which pointed to Wemark as the perpetrator of the crime. His wife had been found dead in his home with stab wounds to her neck, chest, and back. The crime scene had been cleaned, and certain clothing had been washed. However, law enforcement authorities followed a trail of bloody clothing to an abandoned farm house where Wemark was found in a fetal position with two self-inflicted gunshot wounds. Wemark initially told authorities his wife had fallen on a knife, but he later admitted to stabbing her. There was also evidence Wemark was upset about the estrangement from his wife and had made a statement in the past inferring an intent to end the marriage with a murder-suicide. Wemark gave conflicting accounts to authorities about the location of the rifle he used to shoot himself. Investigators eventually discovered the rifle with Wemark's help, but were unable to find the knife during the months following the incident despite a prolonged search of the home.
>
> Defense counsel employed a medical expert prior to trial to conduct a psychiatric examination of Wemark in an effort to

obtain evidence to support the defense of diminished capacity. The expert examined Wemark and reported to defense counsel that he was unable to substantiate the defense.

Wemark was also scheduled to be examined by Dr. Michael Taylor, a medical expert employed by the State after Wemark filed his diminished responsibility defense. Before the scheduled interview, Wemark disclosed the location of the knife he used to stab his wife to his counsel. He had placed the knife in a pile of automotive parts under the basement steps of the house, which law enforcement authorities failed to detect during their extensive search of the home.

Defense counsel were immediately concerned they had an ethical obligation to disclose the location of the knife to the prosecution. They considered nondisclosure to be the same as concealment and an interference with police investigation. They solicited general opinions based upon hypothetical facts from a judge and three experienced lawyers, who all confirmed the presence of an ethical dilemma. However, some of the opinions may have been premised on the assumption that the knife was in the possession of defense counsel. Nevertheless, defense counsel concluded they had three options to pursue once Wemark informed them of the location of the knife. The first option was to wait for the State to search the house again and find the knife. Yet, defense counsel believed it was unlikely law enforcement would search the home a second time. The second option was to have Wemark inform Dr. Taylor of the location of the knife during the scheduled interview. Defense counsel knew Dr. Taylor would then notify the prosecutor. The third option was to engage the services of an attorney to relay the location of the knife to the prosecutor without disclosing the source of the information.

Defense counsel believed the second option could be used to Wemark's benefit. They felt voluntary disclosure could be used at trial to bolster Wemark's credibility and show the ineptitude of the police investigation. Additionally, defense counsel felt it was beneficial to Wemark to keep his scheduled

> appointment with Dr. Taylor despite the findings of their own expert witness. They hoped Dr. Taylor might bolster the defense of diminished responsibility.
>
> Defense counsel informed Wemark of the ethical dilemma and the three options. They urged him to keep the appointment with Dr. Taylor and to disclose the location of the knife during the course of the examination.
>
> Wemark was subsequently interviewed by Dr. Taylor. He informed Dr. Taylor of the location of the knife. Dr. Taylor then relayed the information to the prosecutor and the knife was removed in a second search of the home. The knife was introduced into evidence at trial and displayed by the prosecutor in closing argument. The State also conducted forensic tests on the knife prior to trial and was unable to find any fingerprints but did find traces of blood consistent with characteristics of Melissa's blood. This evidence was introduced at trial, as well as the location of the knife.

Wemark v. State, 602 N.W.2d 810, 812-13 (Iowa 1999).

The Iowa Supreme Court affirmed the denial of petitioner Wemark's postconviction relief action on November 17, 1999. *Id.* at 818. The Iowa Supreme Court concluded that Wemark's counsel had failed to perform an essential duty when they advised him to disclose the location of the murder weapon:

> In this case, the decision by defense counsel to disclose the location of the knife to the prosecutor was premised upon ethical concerns which did not require disclosure. Although tactical reasons were also considered, these tactics were a response to the faulty premise, not underlying reasons to disclose privileged information. Wemark was informed by his defense counsel that the location of the knife must be disclosed, and tactics were developed as a means to deal with the disclosure. Tactics or strategy cannot support disclosure in this case.

Id. at 817. The Iowa Supreme Court, however, found that Wemark had not been prejudiced by his counsel's breach of an essential duty:

> There was overwhelming evidence that Wemark repeatedly stabbed his wife with the knife. Wemark did not deny the stabbing but claimed self-defense, lack of premeditation, and provocation. Although the location of the knife and the forensic evidence discovered from the knife ultimately may have been more helpful to the State than the defense, there was an abundance of other evidence to support premeditation and the lack of provocation independent of the knife. The knife was only a small portion of the host of evidence used by the prosecution to support its claim of first-degree murder. Aside from the evidence that Wemark hid the knife in the basement following the stabbing, there was evidence Wemark changed his clothing following the stabbing and washed Melissa's blood from the clothing he was wearing at the time of the stabbing. There was also evidence Wemark wiped blood from the floor and moved Melissa's body into a bedroom. Wemark never summoned help from neighbors or police, but fled the house. There was further evidence that the knife wounds on his body were largely superficial and self-inflicted, and done only as an after thought to enable him to claim self-defense. There was also evidence Wemark had expressed an intent to kill Melissa on more than one occasion, and was very upset and angry over the estrangement of their marriage. Some of the fifteen stab wounds in Melissa's body were in her back. Considering all the evidence, the disclosure of the knife did not affect the outcome of the proceedings. Additionally, there was no claim that any other statement or information given to Dr. Taylor by Wemark was used by the State at trial. There was no prejudice.

Id. at 818.

On April 14, 2000, Wemark filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Wemark's petition asserts one ground for relief: that his trial counsel was ineffective in causing disclosure to the prosecution of the location of a knife Wemark

used to stab his wife. This case was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). Judge Zoss filed a thorough and comprehensive Report and Recommendation in which he recommends that Wemark's petition be denied. Wemark subsequently filed objections to Judge Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of Wemark's petition for a writ of habeas corpus.

II. ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's Report and Recommendation is as follows:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's Report and Recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where

such review is required. *See, e.g.*, *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case, the court must conduct a *de novo* review. With these standards in mind, the court will briefly review the requirements of the federal habeas corpus statute, 28 U.S.C. § 2254(d)(1) and then turn to consider petitioner Wemark's objections to Judge Zoss's Report and Recommendation.

B. The Requirements of § 2254

1. Section 2254(d)(1)

Section 2254(d)(1) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was *contrary to*, or involved *an unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1) (emphasis added). As the United States Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362, 403 (2000), "[F]or [a petitioner] to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1)." *See id.*

In *Williams*, the Supreme Court addressed the question of precisely what the "condition set by § 2254(d)(1)" requires. *See id.* at 374-390 (Part II of the minority

decision); *id.* at 402-12 (Part II of the majority decision).[1] In the portion of the majority decision on this point, the majority summarized its conclusions as follows:

> [Section] 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. *Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied*—the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." *Under the "contrary to" clause*, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. *Under the "unreasonable application" clause,* a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 413 (emphasis added); *see also Whitmore v. Kemna*, 213 F.3d 431, 433 (8th Cir. 2000) ("It seems to us that § 2254(d) as amended by the AEDPA is unambiguous as to the scope of federal court review, limiting such review (at least as compared with past practice) in order to effect the intent of Congress to expedite habeas proceedings with appropriate deference to state court determinations. *See Williams v. Taylor*, 529 U.S. 362, 403 (2000) (noting purposes of AEDPA amendments).").

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[1] In *Williams*, the opinion of Justice Stevens obtained a 6-3 majority, except as to Part II, which is the pertinent part of the decision here. *See Williams*, 529 U.S. at 367. Justice O'Connor delivered the opinion of the Court as to Part II, in which she was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas, and Scalia, thereby obtaining a 5-4 majority on this portion of the decision. *See id.*

The Court also clarified two other important definitions. First, the Court concluded that "unreasonable application" of federal law under § 2254(d)(1) cannot be defined in terms of unanimity of "reasonable jurists"; instead, "the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 4030 S. Ct. at 1522. Consequently, "[u]nder § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be [objectively] unreasonable." *Id.* Second, the Court clarified that "clearly established Federal law, as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision," and "the source of clearly established law [is restricted] to this Court's jurisprudence." *Id.* at 1523.

2. Section 2254(d)(2)

Section 2254(d)(2) of Title 28, as amended by the AEDPA, provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> . . . .
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(2). Thus, § 2254(d)(2) prohibits the grant of a writ of habeas corpus unless the adjudication of the claim resulted in a decision based on an unreasonable determination of the facts. Under 28 U.S.C. § 2254(e)(1), however, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing

evidence." 28 U.S.C. § 2254(e)(1). The Ninth Circuit Court of Appeals has stated that "a state court factual determination is unreasonable if it is 'so clearly incorrect that it would not be debatable among reasonable jurists.'" *Jeffries v. Wood*, 114 F.3d 1484, 1500 (9th Cir.1997) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir.1996), cert. denied, 520 U.S. 1107 (1997), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997)), *cert. denied*, 522 U.S. 1008 (1997). For "more debatable factual determinations, 'the care with which the state court considered the subject' may be important." *Id.* (quoting *Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997)).

C. Discussion

The court will address each of petitioner Wemark's objections to Judge Zoss's Report and Recommendation *seriatim*.

1. Presumption of prejudice

Initially, petitioner Wemark objects to Judge Zoss's conclusion that the issue of presumed prejudice from his counsel's action was unexhausted and he was therefore procedurally barred from raising it in his habeas corpus action. The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687; *accord Johnson v. United States*, 278 F.3d 839, 842 (8th Cir. 2002); *Kenley v. Bowersox*, 275 F.3d 709, 712 (8th Cir. 2002); *Furnish v. United States*, 252 F.3d 950, 951 (8th Cir. 2001); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001); *Johnson v. Norris*, 207 F.3d 515, 517, 520-21 (8th Cir.), *cert. denied*, 531 U.S. 886 (2000); *White v. Helling*,

194 F.3d 937, 940-41 (8th Cir. 1999); *Cox v. Norris*, 133 F.3d 565, 573-74 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998); *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995). Therefore, to uphold Wemark's claim, the court "must find that the counsel's performance was seriously deficient, and that the ineffective performance prejudiced the defense." *Johnson*, 207 F.3d at 517; *accord Johnson*, 278 F.3d at 842; *Kenley*, 275 F.3d at 712; *White*, 194 F.3d at 940; *Cox*, 133 F.3d at 573; *Goeders*, 59 F.3d at 75. If it is easier to dispose of an "ineffective assistance" claim on the "prejudice" prong of the analysis, however, the court may do so, without consideration of whether or not counsel's performance met professional standards, because "'[t]he object of an ineffectiveness claim is not to grade counsel's performance.'" *Goeders*, 59 F.3d at 75 (quoting *Strickland*, 466 U.S. at 697). To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

While a defendant is generally required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel under *Strickland*, this is not so when counsel is burdened by an actual conflict of interest. *Strickland*, 466 U.S. at 692; *see Caban v. United States*, ___ F.3d ___, 2002 WL 276766, at *2 (8th Cir. Feb. 28, 2002). Prejudice is presumed under such circumstances. *See Strickland*, 466 U.S. at 692; *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995). Thus, a defendant claiming he was denied his right to effective assistance of counsel based on an actual conflict need not establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, the defendant need only establish (1) an actual conflict of interest that (2) aversely affected defense counsel's performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); *accord*

Caban, ___ F.3d ___, 2002 WL 276766, at *3. The Eighth Circuit Court of Appeals recently noted in *Caban* that the United States Supreme Court "has never applied *Cuyler*'s rule of presumed prejudice outside the context of multiple representation of codefendants or serial defendants." *Caban*, ___ F.3d ___, 2002 WL 276766, at *3. As a result, the trend has been to limit application of presumed prejudice to "the context of a conflict between codefendants or serial defendants." *Id.*, ___ F.3d ___, 2002 WL 276766, at *4.

As the Eighth Circuit Court of Appeals explained in *Caban*:

> We believe there is much to be said in favor of holding that *Cuyler's* rationale favoring the "almost per se rule of prejudice" does not apply outside the context of a conflict between codefendants or serial defendants. As *Strickland* explained, some finding of prejudice is an essential factor in proving ineffective assistance of counsel. Under *Cuyler*, loyalties divided between codefendants necessarily will infect the very core of at least one's defense, and prejudice should be presumed. However, the same impact will not be found automatically in other conflict situations. The latter may have such limited consequences that they will not invariably demonstrate prejudice and "a denial of the 'right to have the effective assistance of counsel.'" *Cuyler*, 446 U.S. at 349 (quoting *Glasser*, 315 U.S. at 76). In those cases, sound reasoning supports requiring a defendant to prove actual prejudice under the *Strickland* standard in order to meet the constitutional standard for ineffective assistance of counsel.

Id. Nonetheless, in *Caban*, the Eighth Circuit Court of Appeals determined that it need not decide whether the *Cuyler*'s rule of presumed prejudice was limited to cases involving multiple representation of codefendants or serial defendants. *Id.*, ___ F.3d ___, 2002 WL 276766, at *5.

Here, Wemark did not specifically raise or argue in his Iowa post-conviction motion that the *Cuyler* rule of presumed prejudice was applicable in this case. Rather, he simply raised the *Strickland* standard in his claim of ineffective assistance of counsel. Thus, Judge

Zoss concluded that this claim failed because it was unexhausted and procedurally defaulted. Wemark argues that his claim of presumed prejudice was implicit in his claim of ineffective assistance of counsel.

Section 2254 provides for exhaustion of state remedies, and exceptions to the exhaustion requirement, as follows:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
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> (B)(i) there is an absence of available State corrective process; or
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> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b). Thus, "[a] state prisoner wishing to raise claims in a federal petition for habeas corpus ordinarily must first present those claims to the state court and must exhaust state remedies." *Weeks v. Bowersox*, 119 F.3d 1342, 1349 (8th Cir.1997) (en banc), *cert. denied*, 522 U.S. 1093 (1998). The petitioner has "the burden to show that all available state remedies ha[ve] been exhausted or that exceptional circumstances existed" making exhaustion unnecessary. *See Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998); *accord Gentry v. Lansdown*, 175 F.3d 1082, 1083 (8th Cir. 1999) ("To satisfy the exhaustion requirement, [the petitioner] must show that he either made a fair presentation of his claims to the state courts or that he has no other presently available state remedies to pursue."). Claims are not exhausted--that is, have not been "fairly presented" to the state court--unless "the state court rules on the merits of [the petitioner's] claims, or [the petitioner] presents his claims in a manner that entitles him to a ruling on the merits." *Gentry*, 175 F.3d at 1083. The Eighth Circuit Court of Appeals has observed that:

> In this circuit, to satisfy the "fairly presented" requirement, a petitioner is required to refer to a specific federal constitutional

> right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue. See [*Abdullah v. Groose*, 75 F.3d 408, 411-12 (8th Cir. 1996) (en banc)]. Presenting a claim that is merely similar to the federal habeas claim is not sufficient to satisfy the fairly presented requirement. *See id.* at 412.

Barrett v. Acevedo, 169 F.3d 1155, 1161 (8th Cir.), *cert. denied,* 528 U.S. 846 (1999).

Thus, it is the settled law of the Eighth Circuit that "'a habeas petitioner must have raised both the factual and legal bases for each ineffectiveness of counsel claim in the state courts in order to preserve the claim for federal review.'" *King v. Kemna*, 266 F.3d 816, 821 (8th Cir. 2001) (quoting *Flieger v. Delo,* 16 F.3d 878, 885 (8th Cir.), *cert. denied,* 513 U.S. 946 (1994)), *petition for cert. filed*, (Dec. 17, 2001) (No. 01-7548). Here, the court finds that by failing to cite to the *Cuyler* decision itself or to discuss *Cuyler's* rule of presumed prejudice in his Iowa post-conviction relief action that Wemark has procedurally defaulted on that theory in the Iowa state courts. This result follows from the fact the standards of review under *Strickland* and *Cuyler* are distinct. *See Caban*, ___ F.3d ___, 2002 WL 276766, at *3-6. Wemark directed the Iowa courts' attention to the *Strickland* standard and briefed only its requirement of actual prejudice. Not surprising, the Iowa courts then addressed the *Strickland* standard of actual prejudice in analyzing his claim of ineffective assistance of counsel. Thus, Wemark's failure to specifically cite to either the *Cuyler* decision itself or *Cuyler's* rule of presumed prejudice resulted in the Iowa courts never being afforded a fair opportunity to consider the issue of presumed prejudice. Therefore, the court concludes that Wemark has procedurally defaulted on his claim of presumed prejudice and his objection to Judge Zoss's Report and Recommendation is overruled.

2. Plain Error

Wemark's next objection is that even if Judge Zoss was correct that Wemark's

presumed prejudice claim was unexhausted, he should have reviewed the claim under the plain error standard. In support of his argument, Wemark cites the court to the Eighth Circuit Court of Appeals's decision in *Mellott v. Purkett*, 63 F.3d 781, 784 (8th Cir. 1995). In *Mellott*, the Eighth Circuit Court of Appeals observed that: "Federal courts may grant habeas relief even absent exhaustion if special circumstances are present." *Id.* The petitioner in *Mellott*, however, failed to raise his special circumstances argument before the district court as a reason to waive the exhaustion requirement. *Id.* As a result, the court noted that "we do not consider legal arguments raised for the first time on appeal, except for plain error." *Id.* Thus, the *Mellott* decision does not stand for the proposition that the plain error standard is available for review of unexhausted claims. Rather, in *Mellott*, the Eighth Circuit Court of Appeals merely recognized the availability of review of unexhausted claims if "special circumstances are present."[2] Here, Wemark has not identified any "special circumstances" which would negate the exhaustion requirement. Therefore,

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[2] The Eighth Circuit Court of Appeals has held that in order to establish "special circumstances,"

> The petitioner generally must also show the existence of some additional factor (for example, that "state delay is a result of discrimination against the petitioner," *id.*, or that the State has been "unnecessarily and intentionally dilatory," *Mucie v. Missouri State Dep't. of Corrections*, 543 F.2d 633, 636 (8th Cir. 1976).

Jones v. Solem, 739 F.2d 329, 330 (8th Cir. 1984) (footnote omitted); *accord Chitwood v. Dowd*, 889 F.2d 781, 784 (8th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990). In *Chitwood*, the Eighth Circuit Court of Appeals found such special circumstances where the petitioner's challenge was to the actual time of his sentence, which was rapidly elapsing and therefore potentially mooting his claim, as well as the fact that state officials had disregarded the rights of the petitioner who sought the proper execution of his sentence. Wemark has made no such showing in this case.

Wemark's objection to Judge Zoss's Report and Recommendation is overruled.

3. Prejudice prong

Finally, Wemark objects to Judge Zoss's conclusion that the Iowa Supreme Court's decision, that Wemark had not established prejudice resulting from his counsel's allowing him to disclose the location of the murder weapon to the prosecution, was neither contrary to applicable law nor an unreasonable application of that law.

The Iowa Supreme Court concluded that there was overwhelming evidence that Wemark stabbed his wife with the knife:

> Wemark did not deny the stabbing but claimed self-defense, lack of premeditation, and provocation. Although the location of the knife and the forensic evidence discovered from the knife ultimately may have been more helpful to the State than the defense, there was an abundance of other evidence to support premeditation and the lack of provocation independent of the knife. The knife was only a small portion of the host of evidence used by the prosecution to support its claim of first-degree murder. Aside from the evidence that Wemark hid the knife in the basement following the stabbing, there was evidence Wemark changed his clothing following the stabbing and washed Melissa's blood from the clothing he was wearing at the time of the stabbing. There was also evidence Wemark wiped blood from the floor and moved Melissa's body into a bedroom. Wemark never summoned help from neighbors or police, but fled the house. There was further evidence that the knife wounds on his body were largely superficial and self-inflicted, and done only as an after thought to enable him to claim self-defense. There was also evidence Wemark had expressed an intent to kill Melissa on more than one occasion, and was very upset and angry over the estrangement of their marriage. Some of the fifteen stab wounds in Melissa's body were in her back. Considering all the evidence, the disclosure of the knife did not affect the outcome of the proceedings. Additionally, there was no claim that any other statement or information given to Dr. Taylor by Wemark was used by the State at trial.

Wemark, 602 N.W.2d at 818.

Keeping in mind the limited scope of the review permitted under § 2254, the court cannot conclude that the decisions of the Iowa courts regarding the lack of any prejudice that resulted from Wemark's counsel's actions were the result of an unreasonable application of the standards set forth in *Strickland*, nor were the decisions contrary to *Strickland* or other clearly established federal law on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405 (2000) (concurring opinion of O'Connor, J.). Therefore, this objection to Judge Zoss's Report and Recommendation is also overruled.

D. Certificate of Appealability

Wemark must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability on these three issues. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U.S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. With respect to Wemark's claim, the court shall grant a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(3), solely with respect to his claim of presumed prejudice.

III. CONCLUSION

For the reasons delineated above, the court **overrules** petitioner Wemark's objections to Judge Zoss's Report and Recommendation. Therefore, pursuant to Judge Zoss's recommendation, the petition is **dismissed**. Moreover, the court determines that the petition does present one question of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2);

FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will issue as to petitioner Wemark's claim of presumed prejudice.

IT IS SO ORDERED.

DATED this 6th day of March, 2002.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA